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In the Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

BRIAN ZEBLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 633-2217

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TABLE OF AUTHORITIES

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The court of appeals in this class action invalidated the regulations that have been utilized by the Secretary of Health and Human Services since 1977 to adjudicate claims for child's disability benefits under the Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.* Those regulations are designed to give specific content to the statutory definition of "disability" for purposes of child's benefits, which provides that a child is disabled if he suffers from an impairment that is of "comparable severity" to an impairment that would render an adult disabled. 42 U.S.C. 1382c(a)(3)(A). Moreover, the principle on which the regulations are based – that a child will be found to be disabled only if his impairment meets or equals a listed impairment – was embodied in the regula-

tions promulgated by the Secretary at the outset of the SSI program in January 1974 and has been the basis for reviewing hundreds of thousands of applications for child's disability benefits since that time.

Because the decision below substantially alters the settled implementation of the child's disability program and conflicts with decisions of the First and Eleventh Circuits upholding the same regulations, review by this Court is clearly warranted. Respondents' arguments to the contrary are without merit.

1. Respondents first take issue (Br. in Opp. 17-22) with our submission (Pet. 15-17) that the decision of the Third Circuit in this case conflicts with *Hinckley* v. *Secretary of HHS*, 742 F.2d 19 (1st Cir. 1984), and *Powell* v. *Schweiker*, 688 F.2d 1357 (11th Cir. 1982). The conflict, however, is manifest.

a. In *Powell*, the plaintiffs contended that the regulations are invalid because (i) they assertedly are more restrictive than those applicable to adults, and (ii) they do not provide for an individualized, functionally based determination of disability that parallels the consideration of the vocational factors of age, education and work experience in the case of adult claimants whose impairments do not meet or equal the listings in Appendix 1. See 688 F.2d at 1360, 1362 n.13. These are the same contentions upon which the Third Circuit in the instant case relied in invalidating the regulations. See Pet. App. 11a-12a, 13a, 14a-16a, 17a. The Eleventh Circuit, however, rejected those contentions, concluding that children are not clearly treated more restrictively than adults and that the regulations are based on a reasonable interpretation of the statutory standard that the child's impairment be of "comparable severity." 688 F.2d at 1360-1361.

In *Hinckley*, the First Circuit "join[ed] the Eleventh Circuit in upholding the Secretary's regulations" (742 F.2d at

23). In so doing, it expressly rejected the contention, adopted by the Third Circuit in the instant case (Pet. App. 11a-12a, 17a), that 42 U.S.C. 1382c(a)(3)(A) requires the Secretary to make an individualized consideration of nonmedical criteria—such as the child's age, education, and functional limitations—that is parallel to the consideration of an adult claimant's residual functional capacity (RFC) and his age, education, and work experience. See 742 F.2d at 22-23.

b. Respondents' efforts to explain away the circuit conflict are unavailing. For example, respondents describe *Powell* and *Hinckley* as rejecting only the contention that the Secretary must apply "vocational" criteria in evaluating claims for child's disability benefits. See Br. in Opp. 17-19. However, *Powell* and *Hinckley* did not focus narrowly on the need to consider vocational factors as such. The argument rejected by the First and Eleventh Circuits in those cases was that the Secretary is required by the Act to make an individualized assessment of the functional impact that the impairment has on the child in a manner that is *analogous* to the Secretary's consideration of an adult claimant's RFC, age, education and work experience. See *Powell*, 688 F.2d at 1360, 1361; *Hinckley*, 742 F.2d at 22-23. That is the position adopted by the Third Circuit in this case (Pet. App. 17a) and urged by respondents in defense of the judgment below (Br. in Opp. 23, 26-29).

Respondents also argue (Br. in Opp. 20-22) that the circuit conflict is of no current importance because *Powell* and *Hinckley* were decided prior to the enactment of Sections 4(b) and 9(b)(1) of the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. 1382c(a)(3)(F) and 423(d)(5)(B) (Supp. IV 1986). Those provisions require the Secretary to consider the combined effect of several impairments at each step of the sequential evalua-

tion process (see *Bowen* v. *Yuckert*, 482 U.S. 137, 149-152 (1987)) and to consider all the evidence in the claimant's case record. Respondents' reliance on the 1984 Act is misplaced. Section 9(b)(1) does not modify any substantive standards of disability; it is concerned only with the evidence on which a decision under those standards must be made. Section 4(b) likewise lends no support to respondents' position. Even before the 1984 Act was passed, Social Security Ruling (SSR) 83-19 provided that the combined impact of several impairments could be considered in determining whether a claimant's impairments equalled the listings,[1] and that requirement is carried forward under current regulations.[2] Section 4(b) of the 1984 Act therefore casts no doubt on the Secretary's longstanding approach to evaluating claims for child's disability benefits, and respondents in fact point to no evidence of congressional intent to mandate a change in that approach. In any event, the Eleventh Circuit has expressly adhered to its decision in *Powell* since the 1984 Act was passed (*Wilkinson* v. *Bowen*, 847 F.2d 660, 661 (11th Cir.

[1] SSR 83-19 provides that equivalency may be found under any of three circumstances, one of which is where the claimant has "a *combination of impairments* (none of which meet or equal a listed impairment), each manifested by a set of symptoms, signs, and laboratory findings which, combined, are determined to be medically equivalent in medical severity to that listed set to which the combined sets can be most closely related" (SSR 83-19, West Soc. Security Rep't Serv. (Rulings) 90, 92 (Supp. 1988) (emphasis in original).

[2] See 20 C.F.R. 416.923 (stating that the combined effect of multiple impairments will be considered "throughout the disability determination process"); 20 C.F.R. 416.926(a) (explaining the method for determining whether a claimant's "impairment(s) is medically equivalent to a listed impairment"). In light of these regulatory provisions and SSR 83-19, respondents err in contending (Br. in Opp. 8, 21) that the listings do not allow for consideration of the combined effect of multiple impairments.

1987)), thereby refuting respondents' premise that the circuit conflict has been superseded by statute.

c. The circuit conflict that respondents deny was obvious enough to the Third Circuit, which candidly "recognize[d] that [its] decision places [it] in the minority among the courts which considered the legality of these regulations" (Pet. App. 16a). The court below further acknowledged that "[t]he Secretary's arguments on this appeal are essentially those adopted by the courts in *Powell* and *Hinckley*," but it "decline[d] to accept" the "reasoning" and "conclusion" of *Powell* and *Hinckley* (*id.* at 13a), "find[ing] neither decision persuasive" (*id.* at 12a). Similarly, the district court decision upon which respondents principally rely recognizes that the Third Circuit in this case "rejected the reasoning in *Powell* and *Hinckley*" (*Marcus* v. *Bowen*, 696 F. Supp. 364, 381 (N.D. Ill. 1988)).

d. In short, there is a clear and acknowledged conflict between the decision below on the one hand and *Powell* and *Hinckley* on the other.[3] See also *Burnside* v. *Bowen*, 845 F.2d 587, 590-591 (5th Cir. 1988); *Petreleoni* v. *Secretary of HHS*, NO. 87-2021 (10th Cir. Oct. 26, 1988). Furthermore, the legal issue is one of broad and recurring

[3] The conflict is all the more pronounced to the extent that the class certified by the district court, which apparently is of nationwide scope, includes members in the First and Eleventh Circuits. If nationwide relief is ordered by the district court, the effect of the decision below will be to allow the court of appeals in one circuit to overrule the governing circuit precedent in two other circuits that have sustained the Secretary's regulatory approach. After the court of appeals rendered its decision in this case, the Secretary filed a motion in the district court to exclude from the class any individuals residing in the First and Eleventh Circuits in light of the decisions in *Powell* and *Hinckley*, as well as in other jurisdictions in which decisions approving the regulations have been issued or suits challenging the regulations are pending. The district court has not yet ruled on that motion.

importance in the administration of the SSI program, because the challenged regulations are applied in the adjudication of more than 50,000 claims annually under the SSI program.[4] The petition for a writ of certiorari therefore should be granted. That course would be consistent with *Heckler* v. *Campbell* 461 U.S. 458 (1983), and *Yuckert*, in which the Court likewise granted review in light of circuit conflicts on questions of broad importance in the administration of the disability program. See 461 U.S. at 464; 482 U.S. at 145-146.

2. Respondents' defense of the Third Circuit's decision on the merits (Br. in Opp. 22-29) warrants a brief reply.

a. The regulations governing the evaluation of child's disability claims were issued pursuant to the Secretary's general rulemaking authority under 42 U.S.C. 405(a), as augmented by his specific authority under Section 501(b) of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, to "publish criteria to be employed to determine disability (as defined in [42 U.S.C. 1382c(a)(3)(A)]) in the case of persons who have not attained the age of 18" (90 Stat. 2685). "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984). Accord *Campbell*, 461 U.S. at 466; *Yuckert*, 482

[4] The same legal issue is pending before the Eighth Circuit in *Nash* v. *Bowen*, No. 88-2[illegible]2, which is scheduled for oral argument on May 9, 1989, and before the Ninth Circuit in *Burt* v. *Bowen*, No. 88-3990, which has not yet been scheduled for oral argument. In addition, since the certiorari petition was filed, two other district courts have considered the same issue; one sustained the regulations (*Campbell* v. *Bowen*, No. 3-88-0592 (M.D. Tenn. Apr. 3, 1989)) and one invalidated them (*Cagle* v. *Bowen*, No. 88-6069 (W.D. Ark. Apr. 24, 1989)).

U.S. at 145. Respondents have not shown that the regulations at issue here are "manifestly contrary" to the statute. Indeed, as we have shown (Pet. 9-15), the regulations constitute a reasonable implementation of the statutory standard that the severity of a child's impairment be "comparable" (not identical) to an impairment that would render an adult disabled: the regulations provide that a child will be found to be disabled if his impairment meets or equals an impairment contained in the listing of qualifying impairments for adults in Part A of Appendix 1 to the regulations, or if his impairment meets or equals an impairment contained in a *special* listing in Part B of Appendix 1 of additional afflictions that are found primarily in children or that have a particular effect on children.

Contrary to respondents' contention (Br. in Opp. 23, 26-27), the regulations are not divorced from functional considerations. As the Third Circuit acknowledged (Pet. App. 15a-16a), the special listing in Part B contains those impairments that the Secretary determined, after extensive study and consultation with medical experts, to have an impact on a child's development that is comparable to the effect that a disabling impairment has on an adult's ability to engage in substantial gainful activity.[5]

[5] The preamble to the regulations issued in 1977 stated (42 Fed. Reg. 14,705):

> The medical criteria were developed and formulated over a 2-year period by the Social Security Administration Medical Consultant Staff together with practicing physicians, and other professionals, such as psychologists, who are experts in various specialties, primarily pediatrics. In identifying these impairments and the level of severity which would establish disability, these professionals placed primary emphasis on the effects of physical and mental impairments in children, the impact of the impairment on the child's activities, and the restrictions on growth, learning, and development imposed on the child by the im-

b. Respondents' contention that the regulations nevertheless are "inconsistent with congressional intent" (Br. in Opp. 22) ignores both the origins of the Secretary's requirement that an applicant for child's disability benefits must show that his impairment meets or equals the listings and the indicia of congressional approval of that evaluative approach.

On January 11, 1974, the Secretary promulgated regulations governing determinations of disability under the SSI program, which had just gone into effect on January 1, 1974. See 39 Fed. Reg. 1624 (1974). Those regulations provided that a child under age 18 will be deemed disabled if his impairment or impairments are listed in the appendix or, if not listed, they "are determined by the [Social Security] Administration, with appropriate consideration of the particular effect of disease processes in childhood, to be medically the equivalent of a listed impairment" (39 Fed. Reg. 1626, adding 20 C.F.R. 416.904 (1975)). The regulations were promulgated in final form on July 29, 1975. 40 Fed. Reg. 31,778, 31,783. Thus, the evaluative approach that respondents now challenge was instituted at the outset of the SSI program. Such a contemporaneous interpretation and implementation of the statute by the agency charged with setting the program in motion is entitled to great deference.

Significantly, moreover, the regulations prescribing the listings approach were in effect in 1976 when Congress enacted the statutory directive that the Secretary publish "criteria" for evaluating disability in children. In fact, the

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pairments. Those impairments which were determined to impact on the child's development to the same extent that the adult criteria have on an adult's ability to engage in substantial gainful activity were deemed to be of "comparable severity" to the adult listing.

Senate Report on the 1976 Act recognized, quoting the central regulatory provision, that "[t]he regulations which have been issued with regard to disability for children state that if a child's impairments are not those listed, eligibility may still be met if the impairments 'singly or in combination . . . are determined by the Social Security Administration, with appropriate consideration of the particular effect of the disease processes in childhood, to be medically the equivalent of a listed impairment.' " S. Rep. No. 1265, 94th Cong., 2d Sess. 24 (1976). Section 501(b) of the 1976 Act was enacted in response to concerns expressed by state agencies and Congress that SSA had not issued more specific or definitive guidelines to implement the general principle of medical equivalence embodied in the regulations quoted in the Senate Report. S. Rep. No. 1265, *supra*, at 24-25. The Senate Report recognized the difficulty of developing "objective criteria" for determining how to apply the disability definition to children; but the Committee perceived a need for uniform guidance, and it noted that "SSA ha[d] been circulating draft regulations with criteria for child disability for some time" (*id.* at 25). This legislative history manifests no disagreement with the basic regulatory requirement that a child's impairment must meet or equal a listed impairment, taking due account of the particular effect of the disease processes in children. To the contrary, the statutory directive plainly contemplated that the "criteria" to be issued by the Secretary would implement that requirement.

In response to Section 501(b) of the 1976 Act, the Secretary published proposed regulations in December 1976 (41 Fed. Reg. 53,042) and final regulations in March 1977 (42 Fed. Reg. 14,705). Those regulations retained the

general standards of disability for children that were contained in 20 C.F.R. 416.904 (1975), including the general standard of medical equivalence. 42 Fed. Reg. 14,707-14,708 (1977). But in order to furnish the more specific guidance mandated by Congress, the regulations added a new Part B to the Appendix of listed impairments, which contained "additional medical criteria" for the evaluation of children where the criteria in Part A do not give appropriate consideration to the "particular disease process in children." 42 Fed. Reg. 14,708 (1977). The Secretary made clear in the preamble to these regulations, however, that the special listings in Part B did not contain new substantive standards, but rather were intended to "clarify existing adjudicative guides" and "facilitate the decision making process" by furnishing specific criteria directly applicable to children. *Id.* at 14,705. As a result, the Secretary stressed, "[d]eterminations of disability of children have been made and will continue to be made under the authority provided in § 416.904 and in consideration of the basic requirements stated therein" (*ibid.*).

Thus, the basic requirement that an applicant for child's disability benefits establish that his impairment meets or equals a listed impairment was adopted by the Secretary at the very outset of the SSI program and was given more specific content in 1977 in the manner contemplated by Congress. There accordingly is no merit to respondents' contention that the Secretary's current regulations embodying the same approach (see 20 C.F.R. Pt. 404, Subpt. P, App. 1; 416.906, 416.924, 416.925) are inconsistent with congressional intent.

For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM C. BRYSON
Acting Solicitor General

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